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**WILLIAM L. GAUSEWITZ**  
Director

**TO:** State Agencies with Rulemaking Authority  
**RE:** Petitions Alleging Use of Underground Regulations

In the 2005 May Revision Governor Schwarzenegger provided funding for the OAL to resume examining allegations that state agencies are using underground regulations. From 1986 to 2002 OAL had a program to issue determinations pursuant to section 11340.5 of the Government Code. In early 2003, OAL eliminated this program in response to budget cuts. We have adopted new regulations to govern this function and are now accepting petitions alleging the use of underground regulations. Our restored function is fundamentally different from the program that was in place from 1986 to 2003. We previously focused almost exclusively on issuing legal opinions. Our restored program focuses on working cooperatively with agencies to assist in complying with the requirements of California's rulemaking laws.

The OAL regulations now require that any petitioner alleging that your agency has employed an underground regulation must provide a copy of the petition to your agency before submitting it to us. They also allow OAL to work directly with your agency as we consider whether or not to accept the petition and issue an opinion.

OAL has up to 30 days to decide whether or not to accept a petition. We may decline a petition without addressing its merits. We will use these 30 days to contact your agency and seek your input on the issue and to provide you an opportunity to demonstrate, if possible, that the challenged practice is not an underground regulation. Our goal is to promote compliance with the APA, not to issue opinions for their own sake. If a petition identifies an actual underground regulation being employed by your agency, we will work with you to identify the most appropriate response. It may be that an OAL opinion is not the most appropriate response.

Even a valid petition will not necessarily result in OAL issuing a determination. California administrative law is very complicated. Agencies can employ underground regulations without even knowing that they are doing so. We would not necessarily accept a petition in such a case, even though it identified an actual underground regulation. Your agency's decision to change your practices or to adopt the challenged rule through formal APA rulemaking could well be a basis for OAL deciding not to accept the petition.

In the earlier program, people sometimes sought OAL determinations in order to obtain something to influence ongoing litigation. This was possible because OAL previously had very little discretion to decline a petition. This is another difference between our previous program and our current program. The process of petitioning OAL regarding

underground regulations is intended to serve as a low-cost alternative to litigation. If your agency is the object of litigation challenging the purported underground regulation, please tell us this during the 30-day initial review. We could very well conclude that limited OAL staff resources should not be devoted to expressing an opinion on an issue that is, ultimately, going to be resolved by the courts anyway.

If OAL accepts a petition, it will be published in the California Regulatory Notice Register. Your agency will have 30 days from the date of publication in which to prepare and submit a formal response. The petitioner will then be given 15 days to prepare his or her response to your response. Interested members of the public are also allowed to submit comments on the issue as well. OAL has 150 days following publication to issue our formal decision.

Even after a petition has been accepted, the OAL regulations allow you to terminate our review by certifying that you will not employ the purported underground regulation. Since this would occur during the formal review period, the regulations require a formal certification in order to exercise this option, but it is always available. Again, this provision was put in the regulations because our goal is not to issue determinations; it is to promote compliance with the APA.

An OAL determination is not enforceable administratively. We have no authority under the APA to do anything except issue an opinion. We have no power to compel you or any other state agency to change practices. You should be aware, however, that courts give "due consideration" to OAL determinations (*c.f. Grier v. Kizer*; (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244). When these issues are litigated, OAL determinations are much more likely to be upheld by courts than to be overturned.

In restoring this function we have tried to focus upon pursuing the goals of the APA rather than just upon issuing our opinions. We certainly understand that nobody wants to be told that they need to do additional work because of the APA. We hope, though, that by working with state agencies cooperatively and by seeking compliance as our primary goal, we can administer this function in a way that both minimizes conflict and maximizes our ability to assist agencies in their compliance responsibility.

Please direct specific questions about this function to the OAL Reference Attorney by calling at (916) 323-6815 or by e-mail to [staff@oal.ca.gov](mailto:staff@oal.ca.gov).